BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268–0001

Complaint on Sunday and Holiday Collections	Docket No. C2001–1

RESPONSE OF THE UNITED STATES POSTAL SERVICE
TO CARLSON CROSS-MOTION FOR RECONSIDERATION
AND RESPONSE REGARDING DFC/USPS-19 AND
PRESIDING OFFICER'S RULING NO. C2001-1/6
(August 9, 2001)

On July 23, 2001, Presiding Officer's Ruling No. C2001-1/6 granted Douglas Carlson's motion to compel responses to DFC/USPS-19 - 21. On July 27, 2001, the Postal Service moved for partial reconsideration of the Ruling with respect to DFC/USPS-19, seeking to limit the scope of the information produced to that which was actually relevant to the analysis that Mr. Carlson had claimed was the use to which he intended to put the information he had requested. On August 2, 2001, Mr. Carlson filed a pleading which was both a response to the Postal Service's motion for reconsideration, and his own cross-motion for reconsideration with respect to DFC/USPS-19, seeking the elimination of the protective conditions imposed by the Ruling. The Postal Service hereby responds to Mr. Carlson's August 2 pleading.[1]

Protective Conditions

The unmistakable root of Mr. Carlson's cross-motion for reconsideration

[1] On August 3, 2001, David Popkin filed a pleading also styled as a motion for reconsideration of Ruling No. 6, but review of that document suggests that it is actually a pleading in support of Mr. Carlson's motion. As relevant, therefore, the Postal Service will also address Mr. Popkin's pleading in this response.

regarding protective conditions is his unwillingness to accept the restriction that his use of the data that he would obtain should be limited to exclusive use for purposes of analyzing matters at issue in this proceeding. Despite his candid admission that unless prevented from doing so, he would use the CBMS database obtained in response to DFC/USPS-19 for purposes unrelated to this proceeding (Cross-Motion at 7), Mr. Carlson emphatically maintains that he filed his interrogatories exclusively for the purpose of developing quantitative information to be used in this proceeding ("for this purpose and this purpose only," *id.* at 9). If that is the case, the appropriate resolution of this dispute is the one already embodied in the protective conditions, because Mr. Carlson would by definition be unaffected by a restriction to use the material he has sought "for this purpose and this purpose only." No matter how much window dressing he may throw up, nothing in Mr. Carlson's motion should be allowed to distract attention from this fundamental incongruity in his cross-motion for reconsideration.

The specter of the alleged "chilling effect" raised by Mr. Carlson and Mr. Popkin is fanciful. In the real world, the effect of good-faith compliance with the protective conditions would be to preclude them from using the electronic CMBS database that would be provided in response to DFC/USPS-19 for purposes other than analyzing issues in this proceeding. The protective conditions would not impede their use of any collection box information they might have obtained from any other source, including the obvious one of personal examination of collection boxes. For example, it is absurd for Mr. Popkin to suggest (Popkin Motion at 3) that merely looking at a collection box label in the future to determine whether the last collection had already occurred could be construed as a violation of the protective conditions. If the parties wish to claim an

inability to comprehend the implicit distinction between the CBMS data they obtain from the database and collection box information they obtain elsewhere, however, that difficulty would easily be remedied by substituting the word "materials" for the word "information" in those few places within the Certification and Certification Upon Return in which the latter term appears. This substitution would remove any possibility of confusion between use of the material obtained only from the database, and the use of underlying collection box information which could be obtained from sources other than utilization of the data base.

Mr. Carlson's discussion on pages 3-4 of the Cross-Motion does serve to highlight an apparent weak point in the protective conditions, but the true effect of that condition is the exact opposite of what he postulates. He points out that once he receives the database, if he questions collection box practices in locations beyond those he has previously addressed, there would be no way to prove whether or not his questions were based on information he obtained directly from the data base. He claims that this uncertainty would subject him to the possibility of future legal challenges by the Postal Service, a condition which he views as intolerable.

First of all, the Postal Service has long been concerned that no procedural vehicle is evident which could be utilized to address abuses of protective conditions, and certainly none is specified in Mr. Carlson's pleading. Even assuming a viable forum in which the Postal Service could raise such concerns, however, Mr. Carlson fails to address why he assumes that the burden would be on him to prove he did not violate the terms of the protective conditions, rather than on the Postal Service to prove that he did. In reality, the Postal Service recognizes that it would obtain very little from this

portion of the protective conditions other than a good-faith commitment from Mr. Carlson to restrict his uses of the database to those necessary for purposes of this proceeding. Mr. Carlson's pleading makes clear that his unwillingness to make such a good-faith commitment has much more to do with his desire to obtain unencumbered use of the database than with any realistic fear that the Postal Service could successfully maintain an unfounded accusation that he violated those protective conditions and subject him to "legal liability" (Cross-Motion at 9) on that basis.

In fact, the true danger revealed by Mr. Carlson's cross-motion is not that of the Postal Service using protective conditions as a legal club to improperly discourage legitimate service complaints, but of potential abuses, not just of the discovery process, but of the entire complaint process. Stated most simply, the service complaint provision in section 3662 is not intended to operate as a vehicle by which interested parties can conceal their true intent of extracting information from the Postal Service under the guise of an alleged need for hearings to review potential service deficiencies. Parties with broad-ranging interest in local, regional, and national postal matters, no matter how benign their motivation, cannot be allowed to make sweeping demands for massive amounts of information under the pretext that such material is necessary to address what is initiated as a relatively narrow service complaint proceeding, if their true intent is to use that information for other purposes. The Postal Service should not be expected to stand idly by and allow its resources to be misused in this fashion. Short of simply refusing to provide data, the approach adopted by Ruling No. 6 provides the Postal Service with the best available protection against such abuse. The unwillingness of the parties to accept the terms of the protective conditions speaks far louder about their

true motivation than any rhetoric that the Postal Service could possibly bring to bear.

Moreover, what should not be lost sight of by readers in evaluating the cross-motion is, in the context of this proceeding, the essentially tangential nature of the CBMS database. The topic in question is advanced collections on holiday eves, and the alleged harm from that practice. Already available in LR-4 is a specification of the districts that advanced collections in the past, and the details of the collection adjustments in each district. While the Postal Service will not attempt to reargue its view of the complete lack of utility of the additional calculations Mr. Carlson claims he needs the data to conduct, there is no reasonable expectation that the marginal value of those calculation would be substantial. Certainly, given the information already available, there can be no claim that, without these calculations, the Commission would be unable to evaluate the effects of advanced collections. If Mr. Carlson decides that his need to conduct those calculations is insufficient in his mind to outweigh his concerns about the protective conditions, that determination would appear to be much more a reflection of the true importance of the calculations than of any legitimate basis to question the protective conditions.

Three additional points bear mention. First, Mr. Carlson alleges on pages 5-6 that the Postal Service "invented" and "concocted" security concerns regarding CBMS data as an excuse not to provide him easier access to information that he could use to criticize it. He cites his experience in Flushing as an example of how security issues were not identified until after he had made complaints. In reality, however, it is not surprising that some time elapsed between Mr. Carlson's initial information requests and awareness of the potential security ramifications of those requests. Not all postal

employees are equally likely to consider the mail security and employee security aspects of what they might view as routine operational information.

The concerns identified in the Postal Service's opposition to the motion to compel, however, come not from local officials (at Flushing or anywhere else), but directly from the officials charged with mail security -- the Postal Inspection Service. As the Commission may be aware, the Inspection Service is not inclined to shade its views merely to shield the Postal Service from embarrassment. Investigations by the Inspection Service over the years have routinely identified managerial shortcomings, and the Inspection Service has no incentive to "invent" or "concoct" concerns about mail and employee security. The security issues identified in the Postal Service's opposition to the motion to compel are quite real, and Mr. Carlson's allegations in this respect are baseless.

Second, the cross-motion is rather curious in its treatment of the pending FOIA litigation. One could perhaps find Mr. Carlson's fervent desire to obtain unencumbered access to CBMS from his discovery request in this proceeding more understandable (although equally unmeritorious), if it constituted his only possible opportunity to gain access to that database. In fact, however, he has already instituted proceedings in district court litigation to get access to the same database under FOIA, and has been little short of contemptuous in his assessment of the merits of the Postal Service's position in that litigation. In evaluating his cross-motion, therefore, one may wonder why he is so adamant that the Commission must preempt the FOIA litigation and refrain from limiting his use of the material to the analysis of issues for this proceeding. If he prevails in his FOIA litigation, he would presumably get that anyhow.

Moreover, his contention at page 4 that acceptance of the protective conditions in this proceeding would continue to cloud his ability to use information he obtained in the future under the FOIA is disingenuous. The item from the Protective Conditions that he quotes on page 2 clearly indicates that the duties created by its provisions are terminable by specific order of the Commission. Were Mr. Carlson to obtain unequivocal access to the CBMS database from his FOIA litigation, he could move for an order to have the protective conditions in this proceeding lifted, and the Postal Service would not oppose that motion. Under those circumstances, there would be nothing left to protect.

Lastly, Mr. Carlson's proposed alternative "compromise"solution is no solution at all. On page 7 (and again on page 14), he suggests that the Commission "release the files provided in response to DFC/USPS-19 only to participants in this proceeding with no protective conditions," and the "Postal Service would need to trust this small group of people to handle the data in a careful manner that gave due consideration to the Postal Service's security concerns." In fact, however, without protective conditions, there may be no way to limit "release" of those files to anyone. Once they are in the public domain, there would be no apparent basis to refuse to release them to any individual or organization who requested them. The Postal Service does not have unfettered discretion to decide that it is willing to "trust" individual participants in this proceeding, but is unwilling to "trust" other individuals who seek the same or similar information. Instead, a standard procedural tool exists to handle exactly this situation, and that tool is the protective conditions authorized by Ruling No. 6. Mr. Carlson's efforts to have those protective conditions removed should be rejected.

Scope of the Relevant Information

In its July 27 motion for partial reconsideration, the Postal Service showed that most of the information requested in DFC/USPS-19 is irrelevant to the purposes for which Mr. Carlson has claimed a need for it, and that the scope of the information to be produced should therefore be limited to that for which there has been a demonstrated need. Mr. Carlson's August 2 pleading opposes that motion. Since the rules do not normally contemplate replies to oppositions to motions, the Postal Service will limit its comments to correction of a factual inaccuracy in the opposition, and clarification of a potential technical misunderstanding.

On the first point, Mr. Carlson on pages 10-11 alleges that the Postal Service's motion for reconsideration raises an issue that was not raised in its opposition to the motion to compel. That is factually incorrect. The overbreadth of the material requested in DFC/USPS-19, given the uses described for it in Mr. Carlson's motion to compel, was addressed at pages 7-9 of the Postal Service's July 9 opposition to the motion to compel. As discussed in the Postal Service's partial motion for reconsideration, Ruling No. 6 addressed that very issue, but applied what the Postal Service submits is an inappropriate legal standard. In fact, Mr. Carlson references that portion of Ruling No. 6 on page 9 of his instant pleading. It is therefore puzzling, to say the least, as to why he would later in the same document erroneously assert that the issue was not raised prior to the motion for reconsideration.

On the second point, Mr. Carlson on page 13 expresses concern that in those instances in which collection information is provided, it should include all scheduled pickups, rather than merely the last scheduled pickup. Once again, we have a situation

in which the calculations described by Mr. Carlson in his motion to compel require only the last scheduled pickup, and would not employ information about earlier pickups. More germanely, however, the national CBMS database on the mainframe in San Mateo includes information only on the last scheduled pickup. Information on earlier pickups is maintained only at the local level. To obtain such information would require a substantial revision of the burden described in the opposition to the motion to compel, which was predicated on the assumption that only the information in the national database in San Mateo was covered by the request. Thus, while Mr. Carlson implies that comments in the Postal Service's motion for reconsideration on this point are a new proposal to limit its response, in fact, those comments merely reflect what is the Postal Service's understanding of what it would provide under Ruling No. 6 even if unmodified. Perhaps more to the point, they reflect what is in reality the only practical way to proceed.

Conclusion

The issues raised by Mr. Carlson's motion for reconsideration go to the core of the Postal Service's concerns about its participation in section 3662 complaint proceedings. Those proceedings should not be allowed to be used as a conduit to obtain otherwise unobtainable information from the Postal Service. The protective conditions authorized by Ruling No. 6 in this proceeding constitute a reasonable means to balance the legitimate needs of the parties with the strong institutional interests of the Postal Service. Were those protective conditions to be removed, the Postal Service might be forced to reevaluate its approach to this type of litigation. Mr. Carlson's cross-motion to reconsider Ruling No. 6 in order to allow him to escape the operation of those

protective conditions, supported by Mr. Popkin, should be denied.

Therefore, the Postal Service respectfully requests, notwithstanding its own request that P.O. Ruling No. C2001-1/6 be partially reconsidered and that the scope of the compelled response to DFC/USPS-19 be reduced, that Mr. Carlson's cross-motion to remove the protective conditions be denied.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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CERTIFICATE OF SERVICE

I hereby certify that, in accordance with section 12 of the Rules of Practice, I have this day served the foregoing document upon:

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